

BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

09/21/17 #10:03 LUBA

GLENWOOD 2006, LLC,
Petitioner,

vs.

CITY OF BEAVERTON,
Respondent,

and

OREGON BEVERAGE RECYCLING
COOPERATIVE,
Intervenor-Respondent.

LUBA No. 2017-027

FINAL OPINION
AND ORDER

Appeal from City of Beaverton.

E. Michael Connors, Portland, filed the petition for review and argued on behalf of petitioner. With him on the brief was Hathaway Larson LLP.

Peter Livingston, Beaverton City Attorney's Office, Beaverton, filed a joint response brief on behalf of respondent.

Michael Robinson and Seth King, Portland, filed a joint response brief and Seth King argued on behalf of intervenor-respondent. With them on the brief was Perkins Coie LLP.

HOLSTUN Board Member; RYAN, Board Chair; BASSHAM, Board Member, participated in the decision.

REMANDED

09/21/2017

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You are entitled to judicial review of this Order. Judicial review is governed by the provisions of ORS 197.850.

NATURE OF THE DECISION

Petitioner appeals a design review decision.

FACTS

The subject property is located on the north side of Beaverton Hillsdale Highway, across from Jesuit High School, in the City of Beaverton. The property is less than one acre in size and is zoned Community Service (CS) District, which is a commercial land use district. Beaverton Development Code (BDC) 20.10.10(2). Intervenor-respondent (intervenor) proposes to modify an existing building that was formerly operated as a Pier 1 Imports store, so that it may be operated as a beverage container redemption center (BCRC). The BCRC would receive recyclable beverage containers from a number of grocery stores in the surrounding area and from individuals as well. The BCRC would have an after-hours drop-door where containers could be left when the BCRC is closed. The properties to the east and west are generally zoned for and developed with commercial uses. The properties to the north are zoned for and developed with residential uses. Petitioner operates two veterinary hospitals on the adjacent property to the west.

Petitioner first learned of the proposal from an Oregon Liquor Control Commission (OLCC) notice that was posted on the property.¹ Petitioner

¹ We discuss this notice in more detail later in this opinion.

1 (through its counsel) then contacted respondent (the city) to express concerns
2 about the proposal and learned that intervenor had filed an application for
3 design review approval of the building modification to operate the BCRC.
4 Petitioner took the position while the city was considering the design review
5 application that the BCRC is not an allowed use in the CS District and that the
6 city was not following the required city procedure to determine whether the
7 BCRC is an allowed use in the CS District. Record 22-24, 33-36.

8 In an e-mail message to petitioner's counsel dated February 8, 2017, the
9 city took the position that the BCRC is an allowed use in the CS District and
10 that the city's design review of the proposed BCRC through a "Type 1
11 Administrative Review" was the appropriate procedure.² Record 20. The city
12 issued its "Design Review Compliance Letter" on February 22, 2017, and
13 approved a building permit for the BCRC on February 27, 2017. Petitioner
14 appealed both decisions to LUBA in LUBA No. 2017-026 (building permit)
15 and LUBA No. 2017-027 (design review compliance letter). Those appeals
16 were consolidated for LUBA review. In a separate final opinion and order
17 issued this date, we conclude the building permit decision is not a land use
18 decision over which LUBA has review jurisdiction. In that separate final
19 opinion and order we bifurcate LUBA No. 2017-026 from this appeal and
20 transfer LUBA No. 2017-026 to Washington County Circuit Court.

² Type 1 Administrative Review does not include notice or a public right to participate, and limits the right of local appeal to the applicant. BDC 50.35.3.

1 **FIRST AND SECOND ASSIGNMENTS OF ERROR**

2 **A. BCRCs Are Not an Allowed Use in the CS District.**

3 Design Review is required for all permitted uses in commercial land use
4 districts. BDC 40.20.10(2)(C). As noted earlier, the CS District is a
5 commercial land use district. BDC 20.10.10(2). Petitioner contends a threshold
6 determination is required by the city in conducting design review for the
7 proposed BCRC. That threshold determination is whether the BCRC is a
8 permitted use in the CS District. Petitioner contends the city implicitly, and
9 erroneously, concluded that the BCRC is a permitted use in the CS District.

10 Before the city issued its design review decision, petitioner took the
11 position that the proposed BCRC is not a permitted use in the CS District.
12 Record 23, 33. Petitioner contended the BCRC is most accurately classified as
13 a “recycling center.” Recycling centers are not allowed in the CS District and
14 are only allowed in the Industrial District as a conditional use.

15 **B. The Required Type 2 Procedure for Considering Whether the**
16 **BCRC Qualifies as a Similar Use Was Not Followed**

17 Before the city issued its design review decision, petitioner also took the
18 position that since BCRCs are not expressly listed as a permitted or conditional
19 use in the CS District, they are prohibited. BDC 10.20.4. Petitioner argued to
20 the city that the only procedural mechanism the city has under the BDC that
21 might allow it to conclude that a BCRC may be approved in the CS District is
22 BDC 10.50, which authorizes the city to find unlisted uses are “similar to
23 allowed uses.” Such “similar use” decisions must be rendered by the

1 Community Development Director and must follow the city's Type 2
2 procedures, which require notice and an opportunity for interested parties (not
3 just the applicant) to pursue a local appeal. *Id.*, 40.25.15(1)(2). In an e-mail
4 message to petitioner's attorney, the Community Development Director, after
5 acknowledging petitioner's "use" and procedural objections stated: "I
6 understand your concerns and they will be addressed by the land use review."
7 Record 20.

8 The design review decision does not respond to either the permitted use
9 issue or the procedural issue raised by petitioner. And the only arguable
10 attempts by the city to conclude the BCRC is similar to a permitted use were
11 rendered by city planning staff, not the Community Development Director, and
12 were not rendered pursuant to the city's Type 2 procedure or in the design
13 review decision itself. In its second assignment of error, petitioner argues that
14 BCRCs are prohibited in the CS zone.

15 C. Respondents' Argument

16 Rather than respond to petitioner's first two assignments of error on the
17 merits, in their joint response brief, respondent and intervenor (together
18 respondents) argue that LUBA should conclude that both assignments of error
19 are an improper collateral attack on a prior land use decision that determined
20 the proposed BCRC is a permitted use in the CS District. *Butte Conservancy v.*
21 *City of Gresham*, 47 Or LUBA, 282, 291, *aff'd* 195 Or 763, 100 P3d 218
22 (2004). The claimed prior land use decision apparently is an Oregon Liquor

1 Control Commission (OLCC) form on which a city planning staff member
2 checked a box to indicate the proposed BCRC is permitted under the city's land
3 use regulations.³

4 **D. Conclusion**

5 There are several fatal flaws in respondents' collateral attack argument.
6 First, the OLCC form is not in the record and no party has asked that we take
7 official notice of the form. Aside from some statements by petitioner to the
8 city's planning staff about what the checkmark on that form may have
9 indicated, we have no way to be sure what position the city took on the form.
10 Second, the design review decision makes no mention of the OLCC form and
11 therefore does not take the position that the OLCC form is where the city made
12 its final decision that the BCRC use is permitted in the CS District. Third, as
13 explained in more detail below, a planning staff checkmark on an OLCC form
14 is simply not the kind of decision that qualifies as a final, binding land use
15 decision.

16 As far as we can tell, the BDC includes nothing that would make a check
17 mark on an OLCC form, which merely advises the OLCC that the person
18 checking the box believes the proposed BCRC is permitted under its land use
19 regulations, a final city decision that the use is allowed in the CS District. *See*
20 *Hollywood Neigh. Assoc. v. City of Portland*, 21 Or LUBA 381, 384 (1991)

³ This form apparently was completed and returned to OLCC following the notice mentioned earlier in this opinion.

1 (decisions that are not issued pursuant to local procedures for issuing binding
2 declaratory rulings regarding local land use laws are not land use decisions).

3 The OLCC form might constitute a final, binding decision regarding
4 whether the proposed BCRC is a permitted use in the CS District if it was a
5 land use compatibility statement. OLCC is a state agency. Under ORS
6 197.180(1), state agencies are required to “carry out their planning duties,
7 powers and responsibilities and take actions that are authorized by law with
8 respect to programs affecting land use” “[i]n a manner compatible with
9 acknowledged comprehensive plans and land use regulations.” ORS
10 459A.735(1) authorizes OLCC to approve redemption centers like the BCRC.
11 The Land Conservation and Development Commission has adopted a rule that
12 identifies state agency permits that must be compatible with acknowledged
13 comprehensive plans and land use regulations. OAR 660-031-0026. OAR
14 660-031-0035 provides that state agencies issuing such permits may rely on a
15 city’s decision concerning whether a proposed use is compatible with local
16 land use regulations.⁴ However, OLCC decisions regarding redemption centers
17 are not listed at OAR 660-031-0026. Therefore, a local government check-

⁴ Somewhat ironically, although land use compatibility statements can be final binding decisions concerning whether a proposed state agency action is compatible with an acknowledged comprehensive plan or land use regulations, in most cases they are not land use decisions. ORS 197.015(10)(b)(H). Review of appeals of land use compatibility statements described in ORS 197.015(10)(b)(H) lies with the circuit court.

1 mark on an OLCC form, indicating that a proposed use is a permitted use in the
2 applicable zone, is not a land use compatibility statement.

3 Although the parties do not cite it, it may be that the OLCC form was
4 sent to the city to comply with an OLCC rule that requires an application for
5 OLCC approval of redemption centers to include “[e]vidence showing that a
6 redemption center meets the zoning requirements and other applicable local
7 ordinances of the regulating local jurisdiction[.]” OAR 845-020-0025(8).
8 While the OLCC form with the box checked may well be sufficient to satisfy
9 the OAR 845-020-0025(8) *evidentiary* requirement, it is not a final, binding
10 land use decision that the proposed BCRC is a permitted use in the CS zone.⁵

11 Because the OLCC form with the box checked was not a final, binding
12 land use decision, it was not appealable to LUBA, and petitioner is free to take
13 the position in this appeal that the city may not rely on the OLCC form to
14 establish that the proposed BCRC is a permitted use in the CS zone, if that is
15 what the city did.

16 Whether the proposed BCRC use is an allowed use in the CS Distric is
17 clearly a relevant issue, and the city should have addressed that issue in its

⁵ We note one other possible way for the city to issue a final, binding land use decision regarding whether the proposed use is allowed in the CS zone: a zoning classification decision described at ORS 227.160(2)(b), pursuant to the provisions of ORS 227.175(11) and (12). However, no party argues that the act of placing a check mark on an OLCC form constitutes a zoning classification decision described in ORS 227.160(2)(b).

1 design review letter (as the Community Development Director informed
2 petitioner it would do). *Norvell v. Portland Area LGBC*, 43 Or App 849, 852-
3 53, 604 P2d 896 (1979). We remand so that the city may adopt findings that do
4 so. Absent some argument from respondent or intervenor to the contrary, we
5 also agree with petitioner that if the city believes the BCRC may be approved
6 as a use that is similar to a CS permitted use, the Community Development
7 Director must follow the city's Type 2 procedure to do so, as required by BDC
8 40.25.05, 40.25.15(1)(B).

9 Petitioner asks that we go further and determine that the proposed BCRC
10 is a "recycling center," which is allowed in the Industrial District but not the
11 CS District, and that it does not qualify as a "service use," as planning staff
12 suggested while the application for design review was pending. Petitioner asks
13 that we reverse the city's decision. We decline to do so. The term "recycling
14 center" is not defined in the BDC, and we are unprepared to say based on the
15 current state of the briefing that the term could not be interpreted to exclude
16 BCRCs. Although the planning commission would not be entitled to any
17 particular deference regarding such an interpretation, we believe the city should
18 have an opportunity to address that question in the first instance. In addition,
19 the BDC 40.25.15(1)(C)(4) authority to permit uses that are "substantially
20 similar to a use currently identified in the subject zoning district" is a
21 sufficiently subjective exercise that we are also unprepared to say that the city
22 council could not determine that the proposed BCRC is substantially similar to

1 one or more of the many permitted use in the CS District. We do note that
2 although at least one planning staff member concluded the BCRC qualifies as a
3 “service use,” it does not appear the CS District lists “service uses” as a
4 permitted use. The CS District does, however, permit “Service
5 Business/Professional Services.” BDC 20.10.20(13). If that was the provision
6 the city was intending to rely on, it can clarify and explain that position on
7 remand.

8 The first and second assignments of error are sustained.

9 **THIRD ASSIGNMENT OF ERROR**

10 As explained above, the BCRC would have an after-hours drop-door
11 where containers could be left when the BCRC is closed. Under BDC
12 20.10.20(27) and 20.10.25(5) and 20.10.25(7), if the BCRC is to operate
13 between the hours of 10 p.m. and 7 a.m, it must seek and receive conditional
14 use approval. Because intervenor operates facilities elsewhere that operate
15 within those hours, and because intervenor has not sought conditional use
16 approval, petitioner contends it was error for the city to fail to attach a
17 condition of approval to the design review decision that prohibits use of the
18 drop-door at the BCRC during those hours.

19 Respondents argue that intervenor’s application did not seek approval to
20 operate the BCRC between 10 p.m. and 7 a.m. Respondents note that the city
21 did impose a condition that requires intervenor to post a sign that operation
22 hours are from 7 a.m. to 10 p.m., and argue that the city has authority to take

1 action against the BCRC if it does operate between those hours without first
2 securing conditional use approval, with or without the condition petitioner
3 thinks the city should impose.

4 As far as we can tell, respondents are correct. Intervenor did not ask for,
5 and the design review decision does not approve, the right to operate or accept
6 recycling materials between the hours of 10 p.m. and 7 a.m. If the facility in
7 fact operates or accepts recycling materials between those hours, the city has an
8 enforcement process to require that intervenor cease such operation. The third
9 assignment of error is denied.

10 In accordance with our resolution of the first and second assignments of
11 error, the city's design review decision is remanded.

Certificate of Mailing

I hereby certify that I served the foregoing Final Opinion and Order for LUBA No. 2017-027 on September 21, 2017, by mailing to said parties or their attorney a true copy thereof contained in a sealed envelope with postage prepaid addressed to said parties or their attorney as follows:

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Dated this 21st day of September, 2017.


Kelly Burgess
Paralegal

Kristi Seyfried
Executive Support Specialist

1 BEFORE THE LAND USE BOARD OF APPEALS

2 OF THE STATE OF OREGON

09/21/17 AM 9:59 LUBA

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4 GLENWOOD 2006, LLC,
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7 vs.

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9 CITY OF BEAVERTON,
10 *Respondent,*

11 and

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13 OREGON BEVERAGE RECYCLING
14 COOPERATIVE,
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16
17 LUBA No. 2017-026

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19 FINAL OPINION
20 AND ORDER

21
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23 Appeal from City of Beaverton.

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25 E. Michael Connors, Portland, filed the petition for review and argued on
26 behalf of petitioner. With him on the brief was Hathaway Larson LLP.

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34
35 HOLSTUN Board Member; RYAN, Board Chair; BASSHAM, Board
36 Member, participated in the decision.

37
38 TRANSFERRED

09/21/2017

1 You are entitled to judicial review of this Order. Judicial review is
2 governed by the provisions of ORS 197.850.

INTRODUCTION

In this appeal (LUBA No. 2017-026), petitioner appeals a building permit decision. In LUBA No. 2017-027 petitioner separately appealed a closely related design review decision. LUBA previously consolidated those appeals for review.

MOTION TO DISMISS

Intervenor moves to dismiss this appeal, arguing that the building permit is not a land use decision that is subject to LUBA review. As relevant here, LUBA’s jurisdiction is limited to land use decisions. ORS 197.825(1). As potentially relevant here, under ORS 197.015(10)(a), a decision is a land use decision if it is a “final decision” “that concerns the application * * * of” “[a] comprehensive plan” or “[a] land use regulation. A decision is a land use decision if it either applies or should have applied a land use regulation. *Jaqua v. City of Springfield*, 46 Or LUBA 566, 574 (2004).

Intervenor argues the city applied no land use standards in approving the building permit because all relevant land use standards were applied by a closely related design review decision that is the subject of LUBA No. 2017-027, with the result that the building permit does not qualify as a land use decision. *Flowers v. Klamath County*, 17 Or LUBA 1078, 1088 (1989). We issue this date a final opinion and order in LUBA No. 2017-027 remanding that design review decision to the city. We agree all land use standards either were

1 applied, or as explained in more detail in our decision in LUBA No. 2017-027,
2 should have been applied in the design review decision. Because the building
3 permit did not apply and does not appear to have been required to apply any of
4 the kinds of land use standards identified at ORS 197.015(10)(a), and because
5 it appears to fall squarely within the exception to the statutory definition of
6 land use decision at ORS 197.015(10)(b)(B), we do not have jurisdiction to
7 review the building permit decision.

8 Petitioner moves to transfer this appeal to circuit court if LUBA
9 determines that it lacks jurisdiction to review the building permit decision.
10 OAR 661-010-0075(11)(a) and (b). That motion is granted.

11 LUBA No. 2017-026 is bifurcated from LUBA No. 2017-027, and
12 LUBA No. 2017-026 is transferred to Washington County Circuit Court.

Certificate of Mailing

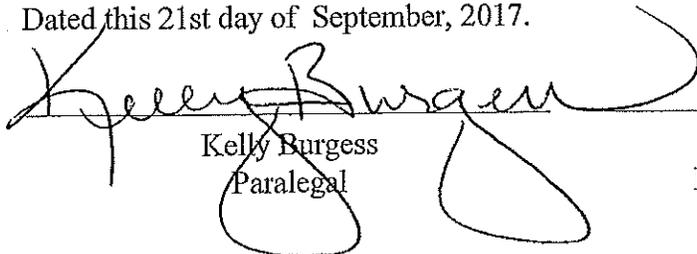
I hereby certify that I served the foregoing Final Opinion and Order for LUBA No. 2017-026 on September 21, 2017, by mailing to said parties or their attorney a true copy thereof contained in a sealed envelope with postage prepaid addressed to said parties or their attorney as follows:

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Dated this 21st day of September, 2017.



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